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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Access Charge Reform	)	CC Docket No. 96-262
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Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

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REPLY TO, AND COMMENTS ON, OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

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FOCAL COMMUNICATIONS CORPORATION
AND
US LEC CORP. REPLY TO, AND COMMENTS ON,
OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Focal Communications Corporation ("Focal") and US LEC Corp. ("US LEC") (collectively, the "Petitioners"), pursuant to Section 1.106(h) of the Commission's rules[1] and the Commission's July 6, 2001 Notice, respectfully submit this Reply To, and Comments On, Oppositions To Petitions for Reconsideration of the *CLEC Access Charge Order* in the above-referenced proceeding.[2]

I. INTRODUCTION

Several parties, including Petitioners, filed oppositions to various of the seven petitions for reconsideration filed seeking clarification and/or modification of the rules adopted in the *CLEC Access Charge Order*. Petitioners support the comments filed by the Association of Communications Enterprises ("ASCENT"), the Association of Local Telecommunications Services ("ALTS"), and Time Warner Telecom ("Time Warner") and urge rejection of the oppositions filed by AT&T Corp. ("AT&T") and Sprint Corporation ("Sprint"). Petitioners urge

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[1] 47 C.F.R. § 1.106(g).

[2] *In the Matter of Access Charge Reform; Reform of Access Charges by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001) ("*CLEC Access Charge Order*").

the Commission to act quickly on Petitioners' request for reconsideration of the new market rule as a lengthy delay will effectively deny that request.

II. PETITIONERS SUPPORT ASCENT'S, ALTS'S AND TIME WARNER'S COMMENTS

ASCENT, ALTS, and Time Warner, like Petitioners, support elimination and/or modification of the Commission's rule requiring CLECs entering a market after June 20, 2001 to tariff access services at the competing ILEC rate in that market. ASCENT and ALTS also ask the Commission to reject Qwest's request for clarification that a CLEC be permitted to tariff the benchmark rate only to the extent that the CLEC is actually providing all of the access services necessary to originate and terminate interexchange traffic. Petitioners support these arguments.

ALTS, like Petitioners, points out that the Commission did not provide adequate notice that it was considering adopting a separate treatment of new markets.[3] Consequently, interested parties were not able to adequately participate in this proceeding or respond to what the Commission was actually contemplating. Now that parties have had an opportunity to point out the serious untoward consequences of separate treatment of new markets, it should be clear to the Commission that the rule should be eliminated.

Similarly, ALTS explains that because of the time needed to prepare for entry into a new market, CLECs should have been given an opportunity to transition to the ILEC rate in order to have sufficient time to adjust their business models.[4] As ALTS noted, many CLECs began investing in new markets before the issuance of the *CLEC Access Charge Order*, in reliance upon the existing regulatory regime, and may not actually begin serving customers in those

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[3] ALTS Comments at 2-3.

[4] *Id.* at 3-5

markets until mid-to-late 2002.[5] ALTS correctly points out that these CLECs justifiably relied upon a certain level of access charge revenues when developing their business plans and, therefore, should be allowed to utilize the three-year transition period to the competing ILEC rate, rather than being forced to flash cut to that rate in new markets.[6]

Time Warner echoes the arguments made by Petitioners, ASCENT and ALTS that the Commission should repeal or modify its new market rule.[7] Moreover, Time Warner adds that these arguments are equally valid for markets in which a CLEC begins its entry process after June 20, 2001.[8] Therefore, Time Warner states that the new market rule should be eliminated entirely.[9] Petitioners support Time Warner's comments and urge the Commission to eliminate the new market rule.[10]

ASCENT and ALTS, like Petitioners, urge the Commission to reject Qwest's request that CLEC use of the benchmark rate be tied to the CLEC's provision of all of the access services provided by the competing ILEC.[11] As ASCENT states, the Commission adopted its benchmark regime in order to establish a bright line rule for determining the reasonableness of a CLEC's access rates, while preserving CLECs' flexibility to establish their own service offering and rate

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5 ALTS Comments at 3-4.

6 *Id.* at 5.

7 Time Warner Comments at 3-6.

8 *Id.* at 5.

9 *Id.* at 5.

10 Time Warner adds that, in the event the Commission decides not to eliminate the new market rule in its entirety, the Commission adopt Time Warner's proposal (delaying the effect of the order for 12 months) rather than Petitioners' proposal to apply the benchmark in those markets in which a CLEC has already invested or signed up customers. Time Warner Comments at 5-6. Petitioners do not oppose Time Warner's proposal, but would add that, to the extent a CLEC began investing in a particular market before June 20, 2001 but is not actually serving customers 12 months later, the CLEC should be permitted to use the benchmark rate at such time as it begins serving end users in that market.

structures.[12] Qwest's request would replace the bright line rule adopted by the Commission with a rule that the Commission could not administer and enforce and that could lead to IXCs attempting to refuse to pay access charges based on their subjective determination that the CLEC did not provide certain services.

III. AT&T'S AND SPRINT'S OBJECTIONS TO PETITIONERS' REQUEST FOR MODIFICATION OF THE NEW MARKET RULE ARE WITHOUT MERIT AND SHOULD BE REJECTED

AT&T's and Sprint's arguments in opposition to elimination or modification of the new market rule amount to no more than the latest manifestation of their desire to pay the lowest access charges possible regardless of whether there is any policy basis for their view.[13] The Commission should reject AT&T's and Sprint's self-serving attempts to reduce their own cost of competing at the expense of CLECs.

AT&T and Sprint erroneously claim that a transition period is not required for new markets because there will be no "disruption" in CLEC services if CLEC access charges are flash cut to the competing ILEC rate in those markets.[14] Neither AT&T nor Sprint offered any evidence to support this claim, let alone to rebut the evidence provided by Petitioners, Time Warner and others that CLEC entry into a new market is an expensive, time-consuming process and that many CLECs have made those investments based upon the existing access charge regime.[15]

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11 ASCENT Comments at 2-4; ALTS Comments at 11-12.

12 *Id. at* 3-4.

13 AT&T Opposition at 4-10; Sprint Opposition at 3-6.

14 AT&T Opposition at 5-6; Sprint Opposition at 4-5.

15 *See, e.g.*, Focal/US LEC Petition at 8-11; Declaration of Aaron Cowell, Jr. at ¶¶ 5-9; Declaration of John Barnicle at ¶¶4-6; Time Warner Petition at 4-8; ALTS Comments at 3.

Petitioners demonstrated that entering a new market can take a year or more and can cost a CLEC millions of dollars to complete.[16] AT&T responds by mischaracterizing this evidence and ignoring the facts. [17] First, the fact is that many CLECs who have invested significant amounts of time and money to enter markets with the expectation that they would recover some of those costs will not be able to do so because of the Commission's arbitrary June 20, 2001 cutoff for the benchmark rates. Second, contrary to AT&T's claim that a CLEC could somehow "accelerate" entry into a market in order to meet the June 20, 2001 deadline or "substantially shorten" the time required to enter a market, many factors necessary for entering a particular market are beyond the CLEC's control and, thus, cannot be "accelerated" by the CLEC.[18] Finally, even if the new market rule is eliminated, CLECs will still be subject to the benchmark in all markets.

Petitioners, and others, also demonstrated that CLECs develop their business plans based in part upon an evaluation of the costs and benefits of offering various packages of services in particular markets.[19] Any significant change in the cost/benefit analysis will, at a minimum, require the CLEC to reevaluate the feasibility of entering certain markets and could potentially result in a decision not to proceed or to withdraw from a market. As ALTS noted, the fact that a change in the regulatory environment renders a business plan no longer economic does not mean

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[16] Focal/US LEC Petition at 8-11; Cowell Declaration a ¶¶ 6-9; Barnicle Declaration at ¶¶ 4-6. *See also* Time Warner Petition at 6-7.

[17] AT&T Opposition at 9-10.

[18] For instance, obtaining certification or other regulatory approvals, negotiating interconnection agreements and actual interconnection with the competing ILEC are significant aspects of market entry over which a CLEC may have little or no control. Similarly, AT&T's claim that any possible disruption in the CLEC market is mitigated by the fact the *CLEC Access Charge Order* did not become effective for two months is without merit and should be rejected. Unless a CLEC was already prepared to enter a new market sometime between April 27, 2001 and June 20, 2001, the additional two months AT&T cites would not have been sufficient for a CLEC to accelerate its market entry plans to meet the June 20, 2001 date.

[19] Focal/US LEC Petition at 7-8; Time Warner Petition at 4-5.

that plan was based on some form of arbitrage[20] or would otherwise lead to inefficient market entry. In deciding to enter a particular market, CLECs may reasonably rely on the fact that, under an existing regulatory regime, they can anticipate recovering their cost of providing service in that market.[21] Such an assumption of cost recovery, not an expectation of subsidies, underlies every competitors' decision to enter a particular market. The Commission should reject AT&T's unsupported claims to the contrary.

Sprint agrees that the disparity in rates for CLECs entering a market after June 20, 2001 and those already serving customers in those markets "can be a legitimate cause for concern", but claims that CLECs have not demonstrated they will suffer material harm from this disparity.[22] Sprint is wrong. Contrary to Sprint's claim, Petitioners explained that a CLEC entering a new market anticipates competing with the ILEC ***and*** with other CLECs already in the market. Thus, as Petitioners stated, while CLECs already in the market will be able to recover their costs, new entrants to the market will be required to recoup their costs from their end users, thus putting them at a competitive disadvantage, or absorb the costs.[23] Accordingly, as Petitioners explained, the Commission's new market rule is not competitively neutral and should be modified.[24]

Moreover, Sprint's arguments against elimination of the new market rule are undercut by its position concerning the Commission's growth/new market restrictions adopted in the *ISP*

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20 ALTS Comments at 5.

21 Cowell Declaration at ¶ 11.

22 Sprint Opposition at 5.

23 Focal/US LEC Petition at 9-10.

24 Sprint's proposed alternative cure for the benchmark disparity – requiring all CLECs in all markets to tariff the competing ILEC rate – should be rejected for the same reasons the Commission determined to establish a transitional mechanism in the first instance.

Compensation Order.[25] There, Sprint opposed the new market rule for all the reasons it now purports to disagree with in this proceeding.[26] The reasoning and rationale behind Sprint's opposition to the new market rule with respect to intercarrier compensation for ISP-bound traffic and Petitioners' opposition to the new market rule with respect to access charges is the same – the new market rule creates competitive inequities and deprives some carriers of the opportunity to recover their investment. Given the clearly inconsistent positions Sprint advocates, the Commission should give no weight to Sprint's arguments in this proceeding and should eliminate the new market rule for all of the reasons stated herein.

IV. THE COMMISSION MUST ACT PROMPTLY

Petitioners are concerned that the Commission will effectively deny Petitioners' request for reconsideration of the new market rule by delaying action on the petition. If the Commission does not issue an order on reconsideration for a year or more, CLECs will be partially through the three-year transition period established by the Commission and any potential for parity provided by use of the benchmark rate will be reduced or eliminated. Moreover, it will be difficult for the Commission and CLECs to adjust CLEC access rates to the benchmark rate after

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[25] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68 (rel. April 27, 2001) ("*ISP Compensation Order*").

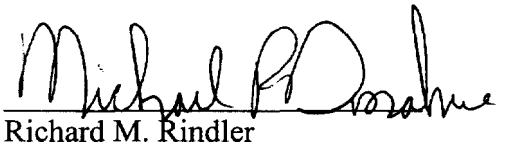
[26] *See* Comments of Sprint Corporation in Support of Core Communications, Inc.'s Petition for Stay, CC Docket Nos. 96-98 and 99-68 at 1-2 (filed June 5, 2001) ("Nevertheless, as long as incumbent CLECs are entitled to receive compensation, while Sprint and other new entrants are not, serious competitive inequities result."); *Ex Parte* Filing of Sprint Corporation in CC Docket Nos. 96-98 and 99-68, at 1-2 (filed June 13, 2001) ("But a one-year extension would only begin to address the inequity of the growth and new market provisions, because, under the terms of the *Order*, differences in compensation as between CLECs resulting from those provisions could last into the indefinite future. . . . A one-year delay, therefore, is insufficient to redress the potential long-term anti-competitive effects of the growth and new market provisions."); Opposition of Sprint Corporation, CC Docket Nos. 96-98 and 99-68, at 6 (filed July 23, 2001) ("As Sprint previously has commented, the growth cap and new market provisions result in competitive inequalities that advantage certain CLECs over others. . . . Instead, the preferable course of action would be to eliminate the growth and new market caps entirely, as Sprint is advocating on appeal.") (footnotes omitted).

a year or more at the ILEC rate. Accordingly, Petitioners urge the Commission to act quickly on Petitioners' request for reconsideration.

V. CONCLUSION

For the forgoing reasons, Petitioners respectfully request that the Commission reject AT&T and Sprint's oppositions to reconsideration of the *CLEC Access Charge Order* and grant the Petitioners' request for elimination and/or modification of the new market rule, as described herein.

Respectfully submitted,



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Dated: August 2, 2001

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I , Wendy Mills, do hereby certify that the attached Reply to, and Comments and Oppositions to Petitions for Reconsideration were served on the parties listed below on this 2nd day of August, 2001.

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